



(Billing Code 5001-06-P)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 244, and 252

RIN 0750-AH39

Defense Federal Acquisition Regulation Supplement: Applicability of Hexavalent Chromium Policy to Commercial Items (DFARS Case 2011-D047)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the applicability to commercial items of DoD policies relating to the use of material containing hexavalent chromium.

Effective Date: Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 571-372-6090.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a final rule (DFARS Case 2009-D004) in the Federal Register at 76 FR 25569 on May 5, 2011, to implement in the DFARS the DoD policy addressing the serious human health and

environmental risks related to the use of hexavalent chromium. Hexavalent chromium is a chemical that has been used in numerous DoD weapons systems platforms due to its corrosion protection properties. However, hexavalent chromium is a known carcinogen. The final rule, codified in a new DFARS clause 252.223-7008, minimized the use of materials containing hexavalent chromium in items acquired by DoD. Shortly after the final rule was published, DOD became aware of a drafting oversight and the need to correct the text of final rule to reflect DOD's intent that the rule should apply to commercial items. This rule corrects that oversight.

DoD published a proposed rule in the Federal Register at 76 FR 71926 on November 21, 2011, to clarify the applicability to commercial items of DoD policies relating to the use of materials containing hexavalent chromium. One respondent submitted a public comment in response to the proposed rule.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comment in the development of the final rule, which is discussed as follows.

Comment: The respondent stated that requiring different standards for chromated defense products than are required of commercial products imposes a significant cost related to the need for additional training and wastes already limited factory space. The respondent also stated that bringing defense product

finishes into line with commercial finishes without sacrificing performance and maintaining a single process should improve production, efficiency, and quality.

Response: This comment is out of scope as the rule does not modify the DoD policy relating to the use of hexavalent chromium, it only clarifies the applicability of the previously published final rule. As such, the respondent's concerns are misplaced because this rule does not create any new requirements for commercial products; it simply makes clear the scope of applicability of DFARS clause 252.223-7008.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule is just correcting a drafting oversight in rule 2009-D004 published on May 5, 2011 (76 FR 25569).

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 212, 244, and 252

Government procurement.

Mary Overstreet

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 212, 244, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 244, and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by—

a. Redesignating paragraphs (f)(iv)(G) through (P) as paragraphs (f)(iv)(H) through (Q); and

b. Adding new paragraph (f)(iv)(G) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(iv) * * *

(G) Use the clause at 252.223-7008, Prohibition of Hexavalent Chromium, as prescribed at 223.7306.

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PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

3. Revise section 244.403 to read as follows:

244.403 Contract clause.

Use the clause at 252.244-7000, Subcontracts for Commercial Items and Commercial Components (DoD Contracts), in solicitations and contracts for supplies or services other than commercial items that contain any of the clauses listed in the clause at 252.244-7000.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.244-7000 to read as follows:

252.244-7000 Subcontracts for Commercial Items and Commercial Components (DoD Contracts).

As prescribed in 244.403, use the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS (DOD
CONTRACTS) (JUN 2012)

In addition to the clauses listed in paragraph (c) of the Subcontracts for Commercial Items clause of this contract (Federal Acquisition Regulation 52.244-6), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(a) 252.223-7008, Prohibition of Hexavalent Chromium (MAY 2011), if the subcontract is for supplies, maintenance and repair services, or construction materials.

(b) 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals (JUN 2012) (10 U.S.C. 2533b), if flow down is required in accordance with paragraph (e) of DFARS clause 252.225-7009.

(c) 252.225-7039, Contractors Performing Private Security Functions (JUN 2012) (Section 862 of Pub. L. 110-181, as amended by section 853 of Pub. L. 110-417 and sections 831 and 832 of Pub. L. 111-383), if the subcontract will be performed in areas of contingency operations, complex contingency operations, or other military operations or exercises designated by the Combatant Commander.

(d) 252.227-7015, Technical Data—Commercial Items (DEC 2011), if applicable (see 227.7102-4(a)), if flow down is required in accordance with paragraph (e) of DFARS clause 252.227-7015.

(e) 252.227-7037, Validation of Restrictive Markings on

Technical Data (JUN 2012), if applicable (see 227.7102-4(c)), if the subcontract or supplier at any tier requires the delivery of technical data.

(f) 252.236-7013, Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers (JAN 2009) (Pub. L. 110-329, Division E, Section 108), if the subcontract involves the acquisition of steel as a construction material.

(g) 252.237-7010, Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111-84), if the subcontract may require subcontractor personnel to interact with detainees in the course of their duties.

(h) 252.237-7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Pub. L. 108-375), if the subcontract may require subcontractor personnel to interact with detainees in the course of their duties.

(i) 252.246-7003, Notification of Potential Safety Issues (JAN 2007), if flow down is required in accordance with paragraph (f) of DFARS clause 252.246-7003.

(j) 252.247-7023, Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631), if flow down is required in accordance with paragraph (h) of DFARS clause 252.247-7023.

(k) 252.247-7024, Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631), if flow down is required in accordance with paragraph (b) of DFARS clause 252.247-7024.

(End of clause)

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